

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Gary F. Menne,

Complainant,

vs.

ORDER ON MOTION FOR
SUMMARY DISPOSITION

Ted Phillips,

Respondent.

The above-entitled matter came before the panel of Administrative Law Judges on Respondent's motion for summary disposition. Respondent filed his motion on January 18, 2007. The Complainant filed a response to the motion on January 22, 2007, and the record with respect to the motion closed on that date.

Frederic Knaak, Knaak and Kantrud, P.A., 3500 Willow Lake Blvd., Suite 800, St. Paul, MN 55110, represented Ted Phillips ("Respondent"). Complainant, Gary Menne, appeared on his own behalf and without counsel.

Based upon all of the files, records, and proceedings herein, and for the reasons set out in the attached Memorandum,

IT IS ORDERED:

1. That Respondent's motion for summary disposition is **DENIED**.
2. That the hearing in this matter will begin at 9:30 a.m. on January 26, 2007, at the Office of Administrative Hearings, as previously scheduled.
3. That the parties shall exchange witness lists and exhibits and file three copies of each with the OAH by 4:30 p.m. on **Tuesday, January 23, 2007**. The parties shall pre-mark their exhibits. Mr. Menne shall use the letters A, B, C, etc., and Mr. Phillips shall use numbers 1, 2, 3, etc.

Dated: January 23, 2007

/s/ Eric L. Lipman

ERIC L. LIPMAN

Presiding Administrative Law Judge

/s/ Barbara L. Neilson

BARBARA L. NEILSON

Administrative Law Judge

/s/ Jennifer Patterson

JENNIFER PATTERSON

Administrative Law Judge

MEMORANDUM

The Complainant, Mr. Menne, ran as a candidate for the Wyoming City Council in the General Election that was held on November 7, 2006, and was elected to a term on the Council on that date. The Respondent, Mr. Phillips, was an incumbent candidate for City Council and was not re-elected.

On November 20, 2006, Mr. Menne filed a Complaint alleging that Mr. Phillips violated Minn. Stat. §§ 211B.02 (false claim of support), 211B.04 (improper disclaimer), 211B.06 (false campaign material) and 211B.07 (undue influence on voters) in preparing and disseminating certain campaign flyers. By way of an Order dated November 27, 2006, Presiding Administrative Law Judge Eric L. Lipman determined that the Complaint set forth a prima facie violation of Minnesota Statute § 211B.07, but dismissed the other allegations.

According to the Complaint, the Respondent prepared and disseminated a flyer that was placed in the newspaper boxes of Wyoming residents who had posted lawn signs in their yard in support of Mr. Menne. The final paragraph of the flyer stated as follows:

NOW you have a choice – Take down the sign in your yard and tell your neighbors that you NO longer support Mr. Menne for the facts listed above. The only way to avoid Mr. Menne getting into office is to vote for the incumbents – ANDERSON – PHILLIPS – ZERWAS. If you don't remove the sign and still believe in Mr. Menne than you must believe in cheating the rest of US in the city and that will not go unnoticed in the future. THANK YOU.¹

Minnesota Statutes § 211B.07 prohibits undue influence on voters and provides, in part:

A person may not directly or indirectly use or threaten force, coercion, violence, restraint, damage, harm, loss, including loss of employment or economic reprisal, undue influence, or temporal or spiritual injury against an individual to compel the individual to vote for or against a candidate or ballot question. . . .

On January 18, 2007, the Respondent, Mr. Phillips, filed a motion for summary disposition. Phillips argues that the remaining undue influence claim fails because Menne cannot establish that Phillips made the alleged threats with "actual malice," or that Phillips "subjectively believed these statements [would] ... cause undue influence amongst the voters."²

Summary disposition is analogous to summary judgment.³ Summary disposition is appropriate in those cases where there are no genuine issues of material fact and the moving party would prevail when the law is applied to the

¹ Emphasis in the original.

² Respondent's motion for summary disposition at 4-5.

³ *Pietsch v. Mn. Bd. of Chiropractic Examiners*, 683 N.W.2d 303, 306 (Minn. 2004).

undisputed facts.⁴ The moving party carries the burden of proof and persuasion to establish that no genuine issues of material fact exist.⁵

When considering a motion for summary disposition, the decision-maker must view the facts in the light most favorable to the non-moving party.⁶ Yet, the non-moving party may not merely rely upon general statements or allegations to avoid summary disposition; but must show the existence of specific facts which create one or more material issues.⁷

The only surviving claim in this matter is whether the flyers distributed by Mr. Phillips included a threat of harm, reprisal, or undue influence made to compel voters to vote for him or against Mr. Menne. For that reason, Mr. Phillips' reliance upon cases involving defamatory statements is misplaced and unavailing. The applicable law relates to the power of the government to proscribe threatening speech.

"Fighting words" or "true threats," are examples of categories of speech that the state may properly regulate and circumscribe without violating the First Amendment.⁸ When enacting Minnesota Statutes § 211B.07, the Minnesota Legislature was operating within its rightful police powers to punish speech that threatens "force, coercion, violence, restraint, damage, harm, loss, including loss of employment or economic reprisal ... [or] undue influence"⁹

To the extent that Phillips suggests that Menne must establish that Phillips subjectively believed harm would befall voters, in order to maintain a claim under section 211B.07, this argument is not well taken. The Legislature may punish threatening speech in political campaigns, even in those cases in which the menacing speaker privately doubts that he later will carry through on his threats.¹⁰ For this reason, a particularized showing of Phillips' subjective beliefs or "actual malice" is not required.

⁴ *Sauter v. Sauter*, 70 N.W. 2d 351, 353 (Minn. 1955).

⁵ *Theile v. Stich*, 425 N.W. 2d 580, 583 (Minn. 1988).

⁶ *Carlisle v. City of Minneapolis*, 437 N.W. 2d 712, 715 (Minn. Ct. App. 1988); *Ostendorf v. Kenyon*, 347 N.W. 834 (Minn. Ct. App. 1984).

⁷ *Murphy v. Country House, Inc.*, 307 Minn. 344, 351-52, 240 N.W. 2d 507, 512 (Minn. 1976).

⁸ *See, Dunham v. Roer*, 708 N.W.2d 552, 565 (Minn. 2006) (citing, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-83 (1992)).

⁹ *Compare*, Minn. Stat. § 211B.07 (2006) with *Dunham*, 708 N.W.2d at 565 ("True threats encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals" [and a] statute that is narrowly tailored to ban or regulate unprotected words of conduct, such as "fighting words" or "true threats" does not implicate the First Amendment ..."); *compare also, United States v. Bellrichard*, 62 F.3d 1046, 1050 (8th Cir. 1995) ("the First Amendment affords no protection to those who utter direct threats of force and violence toward other persons").

¹⁰ *Compare generally, Dunham*, at 567 (Minnesota's harassment statute was found to be constitutional against a First Amendment challenge, where the statute required both objectively unreasonable conduct on the part of the harasser, and an objectively reasonable belief on the part of the person subject to harassing conduct, that the conduct had an adverse effect on their safety, security, or privacy).

Lastly, even if Phillips' motion had pointed to the applicable law, the posture of this case would make a grant of summary disposition inappropriate. The panel concludes that there are genuine issues of material fact as to the meaning and effect of the statement "if you don't remove the sign ... that will not go unnoticed in the future," which precludes entering a judgment as a matter of law.

For all of these reasons, Respondent's motion for summary disposition is denied. Accordingly, this matter will proceed to hearing to be held at 9:30 a.m. on Friday, January 26, 2007, at the Office of Administrative Hearings.

The parties are reminded that the only issue for the upcoming hearing in this matter is whether, by disseminating the flyer, the Respondent threatened force, coercion, violence, damage, harm, loss, reprisal, or undue influence to compel voters to vote for him, or against the Complainant, in violation of Minnesota Statutes § 211B.07.

E.L.L., B.L.N., J.P.